Nos. 64 and 85

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD

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LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL REPLY BRIEF OF LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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What we have said in our Reply Brief respecting the necessity that the term "discrimination" as used in Section

8 (a) (3) of the Act have a relationship or reference to union membership, and respecting the inability of the Board to infer an unlawful discrimination from the mere existence of an otherwise lawful agreement, even though that agreement may be said to have a tendency to be perverted into a system of unlawful discrimination; is fully borne out by a very recent decision of the United States Court of Appeals for the Ninth Circuit—*Pittsburgh-Des Moines Steel Company* v. *N.L.R.B.*, ——F. 2d——, 47 LRRM 2135, decided November 15, 1960. The decision in that case was issued too late for inclusion in our Reply Brief herein. The decision, we believe, affords complete support for our basic position in this case, and we have attached hereto, as an Appendix, a copy of the full text of the opinion for the convenience of this Court.

In substance, the Ninth Circuit in *Pittsburgh-Des Moines*, *supra*, held that the Board was not warranted in drawing any inference of unlawful discriminatory action by an employer because of the mere existence of a system of paying bonuses used by the company which was capable of discriminatory application in respect to union employees on strike. The analogy between that system and the referral system in this case is an exact one. In reversing the Board, the court discussed at length the decisions of this Court in the *Radio Officers* group of cases and stated as follows:

> The conclusive presumption of intent set out in Radio Officers' is dependent upon two prerequisites. First, the encouragement or discouragement of union membership must be a natural and foreseeable consequence of the employer's discrimination. And second, the discrimination itself *must* be based solely upon the criterion of union membership. This second prerequisite is, we think, of the utmost importance. For if every discriminatory

action taken by an employer which could foreseeably result in the encouragement or discouragement of union membership were proscribed by the Act, very few of the legitimate prerogatives of management could survive the flood of unfair labor practice charges. That the Act is not designed to produce such a result is evidenced by the amendment to § 10(c), 29 U.S.C.A. § 160(c), contained in the Taft-Hartley law, to wit, that the Board shall not require the reinstatement of any employee who has been suspended or discharged for "cause." As Professor Cox has noted, the amendment to § 10(c) did not really alter the meaning ascribed to the discrimination provisions from the very beginning. The Act has always permitted the employer to infringe on employees' rights when the infringement is motivated by a desire to protect rights which are legitimately the employer's. See Cox, Some Aspects of the Labor Management Act, 1947, 61 Harv. L. Rev. 1, 20-24 (1947). Thus, even though a natural foreseeable consequence of employer discrimination might be the discouragement of union activity, such discrimination is not unlawful unless actuated by an intent to achieve the foreseeable consequence rather than by a desire to carry out a legitimate business function. Radio Officers' limits rather than contradicts this basic proposition.

Radio Officers' renders the true intent of the employer irrelevant for all practical purposes *only* in situations where the employer's discrimination is based solely on union membership or activity. In those cases, the inference which the Board is permitted to draw operates, in effect to eliminate the requirement that the General Counsel show an actual intent to encourage or discourage union membership. Radio Officers' thus propounds an exception to the usual "true intent" interpretation of § 8(a)(3), an exception born of the need to prevent an employer from indulging in discriminatory action at the threatful behest of an aggressive

union while insulating himself from unfair labor practice charges by claiming in all truth that his discrimination was motivated not by an intent to encourage or discourage union membership, but by a desire to avoid the financial travail attendant upon labor strife. Radio Officers' is obviously directed at and effectively curbs the use of economic coercion by unions to effectuate employer discrimination, an abuse which otherwise might have gone temporarily unchecked under the Act. By eliminating the necessity to show unlawful intent where the employer discriminates solely on the basis of union membership, Radio Officers' precluded under any circumstances the most obvious kind of discrimination provoked by unions and the kind of discrimination which had been brought about by union pressure in all three of the appeals there consolidated by the Court. When criteria other than union membership or activity are used as the basis for an employer's discrimination, the exceptional rule of Radio Officers' does not apply since the kind of discrimination which impelled the rule is absent. It is then up to the Board to predicate a conclusion of unlawful intent upon more specific evidence; a showing of the discriminatory treatment plus its natural and foreseeable consequences will not suffice. In such cases, unlike Radio Officers', the employer claims that he discriminated among his employees not because of their union activities but because of business reasons having nothing to do with labor relations, reasons such as good and bad work, good and bad attendance records, long and short terms of service and the like. (47LRRM at 2140-41 [footnotes omitted])

This is not an easy case. We are fully aware that the vacillations of group productivity are predictably so closely related to participation by the group in protected activity that an extension of the Radio Officers' rule may well be thought appropriate from a policy viewpoint. Indeed the fifth factor in the

company's formula is so broad and flexible that it fairly cries out for abuse, abuse which could conceivably insure that only the low group productivity caused by engagement in prolonged strikes would result in the denial of bonuses. Nonetheless, we do not think the record in the instant case justifies such a step. The evidence showed that petitioner had initiated the administration account procedure in 1936, only one year after the passing of the Wagner Act and before the first Labor Act cases were decided by the Supreme Court. This, fact, in our view, minimizes the possibility that the formula was devised as a coverup for unlawful discrimination. Moreover, the evidence before the Board clearly failed to establish that the formula was in fact so utilized or that the formula was not used at all. *An employer is not guilty of unfair labor practices simply because his activity can all too easily be perverted into a system of unlawful discrimination. The unlawful act itself, not proximity to it, must be shown.* [Emphasis supplied.] (47LRRM at 2145)

It is significant that the sole authority cited by the Board for its thesis is a dictionary definition (Board brief fn. 18); a line of cases holding that agreements which expressly require union membership as a condition of employment are unlawful (Board brief fn. 10); and an asserted analogy under the Robinson-Patman Act derived from *Federal Trade Commission* v. *Anheuser-Busch*, 363 U. S. 536. As to the last, the issue of "motive", *i.e.*, "predatory intent", was expressly remanded to the Court of Appeals. The contrary, that is, that in Labor Board cases the employer's motivation is controlling, has long been well-settled. " . . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for

other reasons than such intimidation and coercion." *N.L.R.B.* v. *Jones and Laughlin Corp.*, 301 U. S. 1, 46 (1937). *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U. S. 177, 186-187 (1941); *Radio Officers* v. *N.L.R.B.*, 347 U. S. 17, 42-44 (1954). Under the Board's presently proposed rule, the action of an employer in closing a unionized plant because it was losing money (thus producing disparate treatment between those laid off and those retained at other plants), in granting a wage increase to employees within an appropriate bargaining unit and not to others (thereby resulting in disparate treatment between those in and those outside the unit (Cf. *Radio Officers* v. *N.L.R.B.*, *supra*, at p. 47)) in offering superseniority to shop stewards (thus producing a disparate treatment between those who are and who are not shop stewards (see *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 526-29; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 53, fn. 21)) would constitute the necessary "discrimination"; in each of these instances it is not difficult to find that union membership is encouraged or discouraged. Union action directed to these ends would of course be equally proscribed under Section 8 (b) (2). The Board seeks by this rule vastly to enlarge its jurisdiction to police any employer choice affecting the status of employees; whatever his motivation or economic justification, to limit the inquiry under Section 8 (a) (3) to the single question whether union membership is encouraged or discouraged thereby, and by this means effectively to read out of the Act the phrase "by discrimination." Any such rule would justify the worst fears concerning the reach of the Act which Chief Justice Hughes took such pains to rebut in *N.L.R.B.* v. *Jones and Laughlin Corp.*, *supra*, at pp. 33-34, 43-46. Insofar as dictionary language is concerned, the Board notes that "discriminate" also means "to distinguish accurately" (Board

Brief, p. 19). This would enable the Board to find "discrimination" if an employer distinguished accurately between applicants for employment on the basis of their competency.

Respectfully submitted,

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APPENDIX

FULL TEXT OF OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN PITTSBURGH-DES MOINES STEEL COMPANY

v.

NATIONAL LABOR RELATIONS BOARD

No. 16690, November 15, 1960

BONE, Circuit Judge:—Petitioner, the Pittsburgh-Des Moines Steel Company, fabricates and sells steel products in interstate commerce. It operates manufacturing plants at Pittsburgh, Pennsylvania, Des Moines and West Des Moines, Iowa, and Santa Clara and Fresno, California; it maintains warehousing facilities at Santa Clara, Fresno, Sacramento, Stockton and El Monte, California. There is no question but that petitioner must conform to the strictures of the National Labor Relations Act, as amended.

Since sometime prior to 1946, petitioner has customarily made gifts of Christmas bonuses to the employees at its various plants and facilities. From 1946 through 1950 all of the Company's employees received yearly yuletide bonuses even though workers at the Pittsburgh plant had struck for 12 days in 1946, and for 12 to 14 days in 1947. In 1951 all employees were given a bonus with the exception of those in the production and maintenance unit organized by the United Steelworkers of America at the Pittsburgh plant. These men had struck for 46 working days during the year. From 1952 through 1955 all employees received bonuses except for the men at the Fresno plant in 1955; the Fresno installation had not been bought by Pittsburgh-Des Moines until August of that year. In 1956 no bonus was

paid to any of the Company's employees. In 1957 all employees got a bonus except for the members of the production and maintenance unit organized by the Steelworkers at the Santa Clara plant. These workers had carried on an economic strike for a total of 57 working days during 1957. No contractual provision has ever obligated the Company to award Christmas gifts; the bonuses have always been gratuitous.[1]

The Company's failure to grant a bonus to the production and maintenance workers at Santa Clara in 1957 resulted in the unfair labor practice charges presently before us on review. The National Labor Relations Board found that petitioner had violated §§ 8(a)(1) and (3) of the Act, 29 U.S.C.A. §§ 158(a)(1) and (3) by restraining its employees from engaging in a strike protected by § 7 of the Act, 29 U.S.C.A. § 157, and by discouraging its employees from participating in such protected activity by discriminating against them in regard to a term or condition of their employment. In reaching its conclusions the Board overruled its Trial Examiner, who found that the Company had traditionally awarded bonuses pursuant to a plan called the Five Factor Formula, that this formula was used in 1957, that its use did not establish ipso facto that the Company intended to discourage economic strikes by discriminating against

[1] During collective bargaining negotiations in 1956, the Steelworkers Union, on behalf of the production and maintenance unit at Santa Clara, tried to get the Company to insert in the bargaining contract a past practices clause which would have obligated the Company to continue all customary practices and procedures which it had carried on in the past, including the gratuitous Christmas gift. The Company specifically refused to enter into an agreement which would require as a matter of contract that it give the yearly Christmas bonus. It maintained that the bonus had always been and should remain voluntary and gratuitous on its part. So, although other practices were contractualized, the Christmas gift was not.

those who took part in them and that consequently there was no violation of the Act. The Board, on the contrary, ruled that the Company did not use the Five Factor Formula in regard to the Santa Clara production and maintenance workers in 1957, that these employees were denied bonuses solely because they had engaged in a prolonged strike and that even if the Five Factor Formula had been applied, its use alone constituted sufficient proof that the Company did intend to discourage and interfere with protected activity by discriminating against the strikers in regard to the customary bonus. The Board concluded that petitioner had violated §§ 8(a)(1) and (3) and issued its order accordingly.

The crux of a violation of § 8(a)(1) or (3) is the true purpose or real motive of the employer in taking the action complained of. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46, 1 LRRM 703 (1937); Associated Press v. N.L.R.B., 301 U.S. 103, 132, 1 LRRM 732 (1937); Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 42-44, 33 LRRM 2417 (1954). And the sole question in this case, *as phrased by both parties*, is whether or not the Board's finding that the motive for withholding the bonus to members of the Santa Clara production and maintenance unit was to penalize them because they engaged in a prolonged strike is supported by substantial evidence.

The Company's position is that of the Trial Examiner: the Five Factor Formula was applied in 1957 as in preceding years, bonuses were not denied to the strikers at Santa Clara merely because they struck, and the application of the formula does not constitute the type of discrimination from which, without specific evidence of motive, the Board might infer that the Company intended to discourage protected activity. See Radio Officers' Union v. N.L.R.B., supra, at

44-48. If, however, the basis by which petitioner claims it selects deserving employees, i.e., the Five Factor Formula, cannot be differentiated from the type of discrimination which in Radio Officers' was held to create an irrebuttable inference of intent sufficient to support findings of unfair labor practices, petitioner cannot here prevail. We look initially to the manner in which the Five Factor Formula in theory discriminates.

The five factors are: (1) overall results, (2) overall productivity, (3) results at each individual plant, (4) productivity at each individual plant, and (5) continuity of work effort at each individual plant. The first two factors are used to determine whether petitioner has had sufficient overall earnings during the year to justify granting a bonus to any of its employees. If examination of these two factors reveals that operations have been sufficiently profitable to warrant payment of a bonus, the work at each of the Company's plants is evaluated in order to determine which employees should or should not be rewarded. Factor 3, the results at individual plants, is apparently determined by profit and loss figures. These figures, however, testified Cedric A. Fegtly, a witness for the Company, do not differentiate as to efficiency among the various groups of employees working out of each plant. This is because the Company does designing and construction work in addition to fabrication, the work done in the shop, and the profit or loss realized from all three activities is apparently lumped together to form the profit or loss total for each plant. Consequently, to determine the efficiency or productivity of each of the various groups of employees working in or out of a single plant, the Company looks to the fourth factor, the productivity of the individual plant. This is determined by the balance or imbalance in what the Company refers to as the plant's administration account. Such an account is

apparently kept for each of petitioner's installations, or at least for its manufacturing facilities.[2]

On the debit side of an administration account are placed those costs which cannot be allocated to a specific job or contract, or, in other words, what is usually referred to as overhead. These costs include taxes, fringe benefits to the working force, holiday pay, vacation pay, jury pay, social security benefits, insurance benefits, hospitalization benefits, depreciation on all items in the plant, factory maintenance, power, light and heat, and wages and salaries paid to all employees whose efforts cannot be broken down in terms of man hours worked in a particular job or contract; in sum, all those expenditures which cannot feasibly be traced to work for a particular customer. On the credit side of the account the Company places the product which results from the multiplication of the cost of direct labor, that is labor which is attributed to and charged upon a specific contract, by a percentage figure which varies according to the type of direct labor involved and which represents the percentage which the Company has ascertained through experience will, when multiplied by normal direct labor costs, result in a dollar amount which will balance or exceed the debit or cost side of the administration account. Each customer is charged not only for the cost of direct labor on the particular job but also for that part of the credit sum in the administration account which is traceable to work done for him. That is, the customer pays the product of direct labor costs on his job multiplied by the appropriate percentage figure, in addition to paying for the direct labor itself. If everything works out properly, the Company should be

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[2] Petitioner introduced into evidence a "Summary of Administration Results, 1946-1957" for all of its manufacturing or fabricating plants with the exception of the Fresno facility. Since the figures appearing in this document and their implications will be of some significance in later discussion, we think it convenient to reproduce the Summary below:

SUMMARY OF ADMINISTRATION RESULTS, 1946-1957

+ Indicates Credits exceeded Costs and Income resulted
− Indicates Costs exceeded Credits and Loss resulted

Administration		Pittsburg	Des Moines	Santa Clara	W. Des. Moines
1957	Costs	2,222,621	1,229,964	624,735	443,206
	Credits	2,517,754	1,321,423	424,265	415,661
		+ 295,133	+ 91,459	−200,470	− 27,545
1956	Costs	2,103,214	939,946	537,323	347,325
	Credits	2,193,099	634,362	488,405	215,636
		+ 89,885	− 245,584	− 48,918	−131,689
1955	Costs	1,867,843	1,043,801	502,296	211,356
	Credits	1,822,871	935,026	416,732	81,247
		− 44,972	− 108,775	− 85,564	−130,109
1954	Costs	2,185,230	1,341,896	430,975	
	Credits	2,105,196	1,229,270	368,541	
		− 80,034	− 112,626	− 62,434	
1953	Costs	2,037,501	1,147,122	281,829	
	Credits	1,801,029	1,116,156	364,282	
		− 236,472	− 30,966	+ 82,453	
1952	Costs	1,611,726	882,138	256,959	
	Credits	1,538,356	925,033	249,952	
		− 73,370	+ 42,895	− 7,097	
1951	Costs	997,701	706,137	219,910	
	Credits	809,960	699,044	181,670	
		− 187,741	− 7,093	− 38,240	
1950	Costs	936,890	598,278	172,039	
	Credits	719,008	566,916	160,382	
		− 217,882	− 31,362	− 11,657	
1949	Costs	912,686	520,464	136,128	
	Credits	828,853	509,491	108,878	
		− 83,833	− 10,973	− 27,250	
1948	Costs	840,018	462,883	104,202	
	Credits	769,988	441,330	92,974	
		− 70,030	− 21,553	− 11,228	
1947	Costs	649,134	393,590	42,354	
	Credits	632,883	376,688	10,555	
		− 16,251	− 16,902	− 31,799	
1946	Costs	584,032	320,292		
	Credits	456,152	283,927		
		− 127,880	− 36,364		

taking in from its customers all or almost all of that which it pays out for overhead. The Christmas bonuses to the employees covered by each administration account is part of the overhead and is listed on the debit side of the ledger.

The Company maintains, the Board assumed, and we therefore do not question that when an appreciable loss shows on the administration account, something is radically wrong with the plant's productivity and efficiency. This is true if, as the Company claims, the normal cost of direct labor multiplied by the appropriate percentage figure approximates the total expenditures for overhead or, in other words, the debit side of the administration account.[3] For when direct labor falls off the costs thereof are lessened, and the multiplicand in the mathematical calculation used to determine the amount on the credit side of the account becomes smaller. The multiplier—the arbitrary percentage figure—does not become larger proportional to the decrease in direct labor costs, and therefore the product is lower than it would have been had direct labor costs remained at the higher, "normal" level.

The Company also looks to the fifth factor which the evidence shows is something more than the description by which it is identified. Continuity of work effort or work relationship includes not only the continued operation of

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[3] We have some difficulty fitting together on the basis of information imparted by the record before us the theoretical operation of an administration account and the figures appearing in the Summary of Administration Results set out at note 2, supra. The Summary shows that both the cost and the credit totals for each account almost invariably increased with each succeeding year. Yet there is no evidence demonstrating that the growth in expenses for overhead was at all proportional to a rise in direct labor costs, that direct labor costs were artificially raised so that the credit side of an account could keep pace with the upward spiral on the cost side, or that the Company's "appropriate" percentage figure was determined in accordance with estimated overhead at each particular plant for the year in question. This last idea seems most plausible,

each individual plant but the forecast for the plant's continued operation and profitability for the future. The continuity of work effort is therefore affected by the economic health of the country, by the economic well-being of the area where the plant is located and by the trend in both the business of the Company as a whole and the business of the individual plant. Much depends upon the continuity of the jobs and contracts available to a particular plant in its own location.

In applying this formula in 1957, the Company contends that analysis of factors 1 and 2 demonstrated that income from all plants and installations was sufficient to justify the granting of a bonus at Christmas of that year. The profit from the Santa Clara plant in 1957 was also exceedingly good. The Company claims that it decided to withhold the bonus from the production and maintenance workers at Santa Clara because of factors 4 and 5. The administration account at Santa Clara for 1957 showed an appreciable excess of costs over credits, indicating a loss in productivity among the production and maintenance workers, who, it seems, were the only employees whose direct labor costs went into the calculation of the credits in the administration account of the Santa Clara plant.[4] The Company further

but all the evidence shows on this point is that the appropriate percentage figure was learned by the Company through experience and varied from job to job and from plant to plant. In any event, since the Board's decision apparently accepts the notion that in theory the imbalance in an administration account indicates low productivity on the part of those employees whose direct labor costs are used to figure the credit total, we shall proceed upon the same hypothesis.

[4] In addition to the production and maintenance workers, there were at Santa Clara approximately 100 other employees of the Company; accountants, sales directors, construction people, administrative and clerical employees, a group of men from a tool house directly connected with construction, a few watchmen and a gardener. All of these other employees received a 1957 Christmas bonus; however, none of their direct

claims that the poor productivity of the production and maintenance workers at Santa Clara determined pursuant to factor 4 did not conclude the bonus issue. The last factor, continuity of work effort, was also examined and was found to militate against giving a bonus to those at Santa Clara whose productivity was wanting. Not only was the continuity of effort at Santa Clara disrupted by the strike but recession was upon the nation, the collective bargaining contract between the Company and the Steelworkers was to be reopened in its entirety for negotiations in 1958, a situation pregnant with the possibility of troubles for the Company, and the business prospects for the Santa Clara plant, located as it was in an agricultural area, were purportedly foreboding. In consequence, the production and maintenance men there were denied a Christmas bonus in 1957.

This, in theory, is how the Five Factor Formula works and how, according to petitioner and the Trial Examiner, the decision to deny the 1957 bonus to the production and maintenance unit at Santa Clara was reached. For purposes of dealing with the second ground upon which the Board predicated its conclusion that the Company had violated §§ 8(a)(1) and (3) of the Act—that the application in 1957 of the Five Factor Formula even as it works in theory is sufficient without more to establish an intent on the part of the Company to interfere with and to discourage protected activity—we assume arguendo that the

labor costs were used to compile the credit figure in the Santa Clara administration account. There was sketchy testimony to the effect that the labor of some of these other employees figured in another administration account, but the account itself was never brought into evidence. All the record shows is that the direct labor of the production and maintenance men was the sum total of that direct labor the costs of which were used in "the" Santa Clara administration account. See Summary of Administration Results at note 2, supra. Consequently, as far as productivity was concerned, the imbalance in the Santa Clara account for 1957 is indicative only of the work of the production and maintenance employees.

formula was used as petitioner claims. Although the workings of the formula seem involved, we think they can be boiled down to one essential consideration, at least insofar as 1957 was concerned. The *sine qua non* for the denial of the bonus to the Santa Clara production and maintenance workers in 1957 was clearly their failure to achieve sufficient productivity to satisfy the demands of the fourth factor in the Company's formula. The considerations embodied in the fifth factor may well have clinched the denial of the bonus, but without the application of the fourth [factor], the yearly gift clearly would not have been withheld.[5] Accordingly, we feel justified in distilling the Company's argument, in accord with its brief on appeal, to the proposition that bonuses were denied the Santa Clara workers because, as shown by factor 4, they failed to achieve a sufficiently high level of group productivity,[6] and that to award and encourage high group productivity is a prerogative of management and a legitimate business pursuit which does not violate the act. The Board's position, on the other hand, is that since group

[5] That the fifth factor could not have been the decisive consideration in withholding the bonus to the production and maintenance workers is borne out by the fact that the gardener and watchmen at Santa Clara did receive a 1957 Christmas bonus. Although the imbalance in the Santa Clara administration account did not show inefficiency on their part, see note 4, supra, the gardener and the watchmen surely cannot be deemed to have contributed their efforts to the entire West Coast operation of the Company rather than to the Santa Clara plant, which they watched and gardened. If, under the fifth factor, prospects were bad for Santa Clara, yet good for the West Coast as a whole, prospects for the watchmen and the gardener would be bad—although perhaps good for other employees at Santa Clara whose efforts were devoted to the broader, West Coast operation. Thus, if the fifth factor were governing, the gardener and the watchmen would not have received a bonus. But they did.

[6] The productivity which the administration account in theory measures is the group productivity of those whose direct labor costs are used to compile the credit total. The account is blind insofar as direct labor costs for each individual worker are concerned, and an imbalance indicates nothing in regard to the work of a particular employee.

productivity must always be affected by a prolonged strike, and was so affected to the detriment both of the Santa Clara strikers in 1957 and the Pittsburgh strikers in 1951, the discrimination called for by the Five Factor Formula in 1957 was based upon engagement in protected activities. Such discrimination leads naturally to the foreseeable consequence that the protected activity is interfered with and discouraged, and, pursuant to the Radio Officers' decision, the discrimination itself is thereby sufficient to establish the unlawful intent of the Company.

Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 33 LRRM 2417 (1954) was a consolidated disposition of three cases, among which was N.L.R.B. v. Gaynor News Co., reported below at 197 F.2d 719, 30 LRRM 2340 (2d Cir. 1952). In that case the Board had held that the News Company had violated §§ 8(a)(1) and (3) of the Act by contractually granting retroactive wage increases and gratuitously awarding vacation payments to its employees who were union members while refusing both the contractual and gratuitous benefits to those of its employees who were not union members. Both union and non-union employees comprised a single bargaining unit for which the union was bargaining representative. The union had entered into a contract with the company providing that in the event the parties negotiated a new contract, the wage rates set out therein would be deemed retroactive for a period of three months; the benefits of such retroactivity, however, were to be given only to union members. Subsequently, a new contract was entered into, and in accord with its agreement with the union, the employer made lump-sum payments to its union employees in the amount of the differential between the old and new wage rates for the three months' retroactive period. In addition to fulfilling this contractual obligation, the company gratuitously awarded its union employees added vacation benefits for

the same retroactive period. The company's non-union employees received neither the lump-sum payments nor the vacation benefits realized by the union members. There was no evidence of a motivation on the part of the employer to encourage union membership. Indeed, there was a great deal of evidence tending to show that the union pressured the employer into acting contrary to its own predilection. See 347 U.S. at 34-38; Note, 42 Geo. L.J. 565 (1954).

With these facts in mind, the Court set out to examine the significance and proof of an employer's motive for the purposes of finding a § 8(a)(3) violation. First, the Court reaffirmed the proposition that the employer's purpose, intent or motive in indulging in discriminatory activity is controlling upon the question of a § 8(a)(3) violation. Id. at 42-44. Specific evidence of this intent, however, is not essential in all cases; it was not essential in Gaynor. Specific proof of intent, said the Court, is unnecessary where employer conduct inherently encourages or discourages union membership, for a man is held to intend the foreseeable consequences of his conduct. Where a natural consequence of an employer's discrimination is encouragement or discouragement of union membership, his protestation that he did not intend to encourage or discourage must be unavailing. If the Board finds that encouragement or discouragement will result, the unlawful intent of the employer is sufficiently established. Despite this broad language the Court clearly chose to limit the Board's ability to infer unlawful intent from a showing of discrimination and the foreseeable results thereof to those situations where the discrimination is based solely upon union membership or union activity.[1] Such discrimination

[1] Radio Officers' reaffirms the interpretation of "union membership" as encompassing participation in legitimate union activities. 347 U.S. at 39-40, 33 LRRM 2417. To avoid undue verbosity we will use the phrases "union membership," "union activity" and "protected activity" interchangeably in this opinion.

based solely on union membership, was exercised in the Gaynor case, and, said the Court, since a natural, foreseeable consequence of the company's activity was the encouragement of membership in the favored union, both encouragement and intent to encourage were established. Id. at 44-46. The Court then proceeded to hold that the contract obligating the company to discriminate in favor of the union was invalid and no defense to those unfair labor practice charges emanating from the discriminatory, lump-sum, retroactive wage payments to union members. As far as the employer's discrimination in regard to the gratuitous vacation benefits was concerned, the contract was apparently deemed irrelevant. Id. at 46-48.

The conclusive presumption of intent set out in Radio Officers' is dependent upon two prerequisites.[5] First, the encouragement or discouragement of union membership must be a natural and foreseeable consequence of the employer's discrimination. And second, the discrimination itself *must* be based solely upon the criterion of union membership. This second prerequisite is, we think, of the utmost importance. For if every discriminatory action taken by an employer which could foreseeably result in the encouragement or discouragement of union membership were proscribed by the Act, very few of the legitimate prerogatives of management could survive the flood of unfair labor practice charges. That the Act is not designed

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[5] Mr. Justice Frankfurter, concurring in Radio Officers' suggests that the inference of intent allowed by the Court is rebuttable and that the Court's opinion and his concurrence are not in disagreement. 347 U.S. at 55-57. While this may well be a consummation devoutly to be wished, the language of the majority opinion refutes the idea that the inference of intent raised by discrimination solely on the basis of union activity it rebuttable. For the Court said, "[A]n employer's protestation that he did not intend to encourage or discourage *must* be unavailing where a natural consequence of his action was such encouragement or discouragement." Id. at 45. The emphasis is ours.

to produce such a result is evidenced by the amendment to § 10(c), 29 U.S.C.A. § 160(c), contained in the Taft-Hartley law, to wit, that the Board shall not require the reinstatement of any employee who has been suspended or discharged for "cause." As Professor Cox has noted, the amendment to § 10(c) did not really alter the meaning ascribed to the discrimination provisions from the very beginning. The Act has always permitted the employer to infringe on employees' rights when the infringement is motivated by a desire to protect rights which are legitimately the employer's. See Cox, Some Aspects of the Labor Management Act, 1947, 61 Harv. L. Rev. 1, 20-21 (1947). Thus, even though a natural foreseeable consequence of employer discrimination might be the discouragement of union activity, such discrimination is not unlawful unless actuated by an intent to achieve the foreseeable consequence rather than by a desire to carry out a legitimate business function. Radio Officers' limits rather than contradicts this basic proposition.

Radio Officers' renders the true intent of the employer irrelevant for all practical purposes *only* in situations where the employer's discrimination is based solely on union membership or activity. In those cases, the inference which the Board is permitted to draw operates in effect to eliminate the requirement that the General Counsel show an actual intent to encourage or discourage union membership. Radio Officers' thus propounds an exception to the usual "true intent" interpretation of § 8 (a)(3), an exception born of the need to prevent an employer from indulging in discriminatory action at the threatful behest of an aggressive union while insulating himself from unfair labor practice charges by claiming in all truth that his discrimination was motivated not by an intent to encourage or discourage union membership, but by a desire to avoid the financial travail attendant upon

labor strife. Radio Officers'[9] is obviously directed at and effectively curbs the use of economic coercion by unions to effectuate employer discrimination, an abuse which otherwise might have gone temporarily unchecked under the Act. By eliminating the necessity to show unlawful intent where the employer discriminates solely on the basis of union membership, Radio Officers' precluded under any circumstances the most obvious kind of discrimination provoked by unions and the kind of discrimination which had been brought about by union pressure in all three of the appeals there consolidated by the Court.[9] When criteria other than union membership or activity are used as the basis for an employer's discrimination, the exceptional rule of Radio Officers' does not apply since the kind of discrimination which impelled the rule is absent. It is then up to the Board to predicate a conclusion of unlawful intent upon more specific evidence; a showing of the discriminatory treatment plus its natural and foreseeable consequences will not suffice.[10] In such cases, unlike Radio Officers', the employer claims that he discriminated among his employees not because of their union activities but because of business reasons having nothing to do with labor relations, reasons such as good and bad work, good and bad attendance records, long and short

[9] We do not mean to say that Radio Officers' applies only in cases where union pressure is discernible; it applies in all cases where the employer's discrimination is based *solely* on union activity. We mean only to suggest, although perhaps it is not incumbent upon us to rationalize a Supreme Court decision, that the *raison d'etre* for Radio Officers' is the necessity as a matter of policy to prevent employer discrimination at the instigation of an ambitious union.

[10] "But if [the employer's] criterion is, for example, individual employee efficiency or seniority, then something more [than the discrimination] would be necessary for showing an unfair labor practice." N.L.R.B. v. Richards, 265 F.2d 855, 860, 43 LRRM 2820 (3rd Cir. 1959). In the Richards case, Radio Officers' was applied: the discrimination was based solely on union membership.

terms of service and the like. See Bituminous Material & Supply Co. v. N.L.R.B., 281 F.2d 365, 46 LRRM 2770 (8th Cir. 1960); N.L.R.B. v. Sebastopol Apple Growers Union, 269 F.2d 705, 44 LRRM 2755 (9th Cir. 1959); N.L.R.B. v. Ford Radio & Mica Corp., 258 F.2d 457, 42 LRRM 2620 (2d Cir. 1958).

In the instant case—we are still assuming that the Five Factor Formula was applied as claimed—the Company did not discriminate against the Santa Clara strikers solely because they struck. Indeed, if the Company's argument was that it discriminated solely on the basis of the strike, but didn't intend to discourage union activity, we would have an entirely different situation, one in which the sole criterion for discrimination would be protected union activity. Here, however, the employer has discriminated *on the basis of group productivity*, not participation in a prolonged strike. The difficulty in the case is that the group's productivity, an aspect of business which management could seemingly reward and encourage, is foreseeably dependent and, the evidence indicates, actually was dependent upon the lack of a prolonged strike. In other words, group productivity will almost always rise and fall in proportion to participation by the group in prolonged walkouts: the facts in the instant case exemplify the generalization. And there is a difference between this situation and one where the basis of the employer's discrimination has nothing whatever to do with protected activity. When an employer discharges a union organizer for kleptomania or disturbing women employees, the purported cause of discharge has no relation at all to protected activity, while in the present case the alleged cause of the denial of the bonus, lack of group productivity, is the direct result of participation in protected activity. In seeking to enlist the assistance of Radio Officers' the Board equated diminished group productivity with participation in a prolonged strike and concluded

that discrimination on the basis of lower group productivity was in this case no different from discrimination on the basis of striking, a protected activity. This in effect means that under Radio Officers' an employer cannot use the lack of group productivity as a criterion for withholding a bonus when such a lack is caused by the group's engagement in a lengthy strike.

We disagree.

That protected union activity is the direct cause of a business condition upon which an employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity. An employer may hire permanent replacements for economic strikers even though the business condition—a lack of manpower—which impels the employer to act was directly caused by the strike. N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345, 2 LRRM 610 (1938). Discussion in Olin Mathieson Chemical Corp. v. N.L.R.B., 232 F.2d 158, 37 LRRM 2895 (4th Cir. 1956), affirmed per curiam, 352 U.S. 1020, 39 LRRM 2508 (1957) and in N.L.R.B. v. California Date Growers Association, 259 F.2d 587, 42 LRRM 2805 (9th Cir. 1958), indicates that when in order to obtain replacements for economic strikers it is necessary for an employer to promise seniority to the replacements, the denial of seniority status to those strikers who are reinstated is not an unfair labor practice, although the business condition which actuated the employer to deny seniority status to reinstated strikers was directly caused by the strike itself.[11] And in Local 200, International Brotherhood of Teamsters v. N.L.R.B., 233 F.2d 233, 238, 38 LRRM 2095 (7th Cir. 1956), the court approved a conclusion of the

[11] To the same effect see N.L.R.B. v. Potlatch Forests, Inc., 189 F.2d 82, 28 LRRM 2128 (9th Cir. 1951), decided prior to Radio Officers'. The grounds upon which the later cases distinguished or disagreed with Potlatch do not pertain to the present problem.

Board which held that an employer had not committed an unfair labor practice by discharging an employee because the demand for his job had ceased, even though the job was rendered unnecessary by the employee's own picketing. The picketing, a protected union activity, had caused business to drop off with the result that the employer no longer had any need for the job which the employee had been doing. See Atlas Storage Division, 112 NLRB 1175, 1195, 36 LRRM 1171 (1955).

In all the cases mentioned above the business condition upon which the employer predicated his discriminatory action was the direct result of participation in protected union activity by those employees who were discriminated against, yet Radio Officers' was not applied; the employer's true intent was looked into. We think the instant case must be treated similarly. There is surely sufficient evidence from which the Board could conclude as it did that if the Company used the Five Factor Formula, the lack of group productivity on the part of the production and maintenance workers at Santa Clara was the cause of their failure to receive a Christmas bonus in 1957. There was also sufficient evidence from which the Board could infer that the poor productivity of the Santa Clara group was caused by their participation in a prolonged strike during the year in question. The strike may well have caused the business condition—poor productivity—which the employer used as the criterion for its determination to withhold the bonus, but the protected union activity was not in itself the basis of the employer's discrimination. Consequently, Radio Officers' does not apply.[12] To enforce the Board's order we

[12] In view of our conclusion that Radio Officers' is inapplicable in the present case because the discrimination here was not based solely upon union membership, we consider it unnecessary to examine the other reasons urged by petitioner in support of its inapplicability argument. As to the possible effect of the contractual negotiations, see note 1, supra, between the Company and the Steelworkers Union at Santa Clara, see

must find in the record substantial evidence of the motive or intent which underlay the Company's action, evidence other than the discriminatory action and its foreseeable consequences.

This brings us to the first ground upon which the Board predicated its conclusion that petitioner had violated §§ 8 (a)(1) and (3) of the Act: that Pittsburgh-Des Moines as a general rule did not adhere to the Five Factor Formula but rather gave bonuses to all of its employees or to none of them and that the denial of the 1957 bonus to the strikers at Santa Clara, like the denial of the 1951 bonus to the strikers at Pittsburgh, were exceptions to the general practice, exceptions designed to penalize employees who participated in prolonged walkouts.

In determining that petitioner's general practice in regard to the yearly Christmas bonus was to give to all or to give to none, the Board relied upon two strands of evidence. First, it apparently considered that the history of petitioner's yuletide gifts implied such a practice. To recap the pertinent facts set out previously, all employees received bonuses every year since 1946, except in 1951, when the Pittsburgh strikers who had stayed out for 46 working days got no gift, in 1955, when the Fresno employees who had been working for Pittsburgh-Des Moines only since August of that year, were left out, in 1956, when no employees received a gift, and in 1957, when the Santa Clara strikers were denied a bonus. Omitting the self-explanatory denial of a bonus to the Fresno workers in 1955, we cannot deny that the Company did in fact give a bonus either to all or

N.L.R.B. v. Nash-Finch Co., 211 F.2d 622, 33 LRRM 2898 (8th Cir. 1954); Intermountain Equipment Co. v. N.L.R.B., 239 F.2d 480, 39 LRRM 2253 (9th Cir. 1956). As to the possible effect of the existence of multiple bargaining units among the Company's employees, compare Anheuser-Busch, Inc., 112 NLRB 686, 36 LRRM 1086 (1955) and Speidel Corp., 120 NLRB 733, 42 LRRM 1039 (1958) with Crosby Chemicals, Inc., 121 NLRB 412, 42 LRRM 1371 (1958).

to none of its employees except on the two occasions when a group of workers had participated in a prolonged strike. We think this fact is hardly sufficient however, from which to draw the inference that the idea of all or nothing constituted the Company's general practice. Surely the Board could not infer from the firing of union sympathizers over the years that an employer followed a general practice of getting rid of unionists if the employer could show that the work of every man discharged was exceedingly bad. Some further evidence would be necessary, and we think it is also necessary in the instant case. Here the Company can and has explained each of its bonus decisions since 1946 on the basis of the Five Factor Formula.[13] The Board cannot simply assume that because the Christmas gifts can also be explained by attributing another system to the Company, a system which includes unlawful exceptions, such an unlawful system was utilized. We hold that the Board could not

[13] The Company's witness, Thomas G. Morris, testified that the bonuses to the Pittsburgh production and maintenance workers in 1951 and to their Santa Clara counterparts in 1957 were denied because of low group productivity as shown by the imbalance in the pertinent administration account for the year in question. See note 2 supra. The failure to give a bonus to anybody in 1956 is attributed to factors 1 and 2; the Company's overall earnings were insufficient. In 1950 and 1953 the administration loss at the Pittsburgh plant was higher than it was in 1951 when the bonus was withheld. Morris testified that the 1953 bonus was given at Pittsburgh because the Company anticipated that the administration results there would greatly improve in the next year; in other words, the outlook under factor 5 was good. At Santa Clara in 1957, the factor 5 outlook was dim. As far as the 1950 bonus at Pittsburgh is concerned, Morris testified that the gift was given despite low productivity because the Company had experienced a year of unusual profit from all of its facilities. Yet the General Counsel's evidence tended to show that 1957 was also a year of great profit for Pittsburgh-Des Moines. Indeed, the failure of the Company to explain why 1950 at Pittsburgh was different from 1957 at Santa Clara—perhaps factor 5 again—is in our view the single, specific aspect of the case which could indicate an unlawful motive. On the basis of the record as a whole, however, this indication is overwhelmed by credible evidence that the Company did not intend to penalize strikers.

reasonably have inferred, as it did, from the history of the Company's giving at Chirstmas time, that petitioner had followed a general practice of rewarding all of its employees or none of them. In the absence of other, indicative evidence, the inference is wholly unjustified. See N.L.R.B. v. Kaiser Aluminum & Chemical Corp., 217 F.2d 366, 368, 34 LRRM 2412 (9th Cir. 1954).

The Board purportedly found additional evidence of the Company's general practice in the testimony of witnesses for the union who said that Mr. Fegtly, the man in charge of Pittsburgh-Des Moines' West Coast operations, had told them, while explaining why the Santa Clara workers did not receive a Christmas bonus in 1956, that the Company's practice was to give to all or to none and that although the Santa Clara employees did exceptionally good work in 1956, since the overall earnings at other plants were not sufficient to warrant a bonus, nobody was going to get one. At the hearing before the Trial Examiner Fegtly denied making any such statement concerning the Company's general practice in awarding Christmas bonuses, and stated that the Company always used the Five Factor Formula. The Trial Examiner credited Fegtly in full and disbelieved the witnesses for the union, who testified to the words which Fegtly denied. The Board, although it did not hear the witnesses and could not have observed their demeanor nor judged their veracity at first hand, reversed the Trial Examiner on his findings of credibility.

We have recently had occasion to re-assert that credibility is peculiarly the province of the Trial Examiner and that a reviewing court should not disturb his findings on that score unless the testimony which he credited was hopelessly or inherently incredible. N.L.R.B. v. Local 10, Int'l Longshoremen's Union, 9th Cir., 10/13/60, 46 LRRM 3141. The Board, possessing an expertise which a reviewing court does not have, is not similarly restricted. Nonetheless, "we

are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded." N.L.R.B. v. Universal Camera Corp., 190 F.2d 429, 430, 28 LRRM 2274 (2d Cir. 1951). Nor should the Board be permitted are not to be reluctant to insist that an examiner's findings of credibility made by the Trial Examiner or to discard positive findings of credence in favor of inferences drawn from tenuous circumstances. N.L.R.B. v. Pyne Molding Corp., 226 F.2nd 818, 819, 37 LRRM 2007 (2d Cir. 1955); Boeing Airplane Co. v. N.L.R.B., 217 F.2d 369, 376, 34 LRRM 2821 (9th Cir. 1954). We think this is exactly what the Board has done in the present case by refusing to accept the Trial Examiners' belief in Fegtly's testimony yet believing the testimony of others whom the Trial Examiner refused to credit. The reversal of the Trial Examiner's findings was based on the tenuous inference drawn from the history of petitioner's Christmas gifts and from the sketchy evidence discussed below. Viewing the evidence "in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view," we are convinced that the finding of the Board that the Company's general practice in giving Christmas bonuses was to reward all of its employees or none of them is unsupported by substantial evidence. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488, 27 LRRM 2373 (1951); Morrison-Knudsen Co. v. N.L.R.B., 276 F.2d 63, 73, 45 LRRM 2907 (9th Cir. 1960).

The other evidence relied on by the Board in reaching its conclusion that the denial of the 1957 Christmas bonus to the production and maintenance workers at Santa Clara was motivated by a desire to penalize them for engaging in a prolonged strike is equally flimsy. First, the Board noted that the resolution of the Company's Board of Directors which withheld the bonus did so in regard to the

"striking employees" at the Santa Clara plant. That the resolution was put in these terms does not in our opinion afford a proper basis for inferring that the purpose of the denial was to penalize the strikers. Again, we think the inference drawn by the Board is completely arbitrary; motivation is not to be inferred from terms of designation. Freudian theory is not yet an adequate substitute for the required evidence of intent. The Board also relied upon a statement made by Robert Barrett, the Company's personnel manager at Santa Clara, to the effect that the striking employees had pretty well fixed the situation and that he, Barrett, could not see why the Company would give money away to men who had caused it to suffer a substantial loss. The record shows that Barrett had come to work with petitioner only months before he made the statement outlined above, that he did not know how the determination to give Christmas bonuses was made, that nobody in the Company had ever told him that the denial of the 1957 bonus to the Santa Clara strikers was to penalize them for striking, and that whatever he said was only his own personal opinion. To infer the motive of the Company from Barrett's statement is to indulge in out-and-out conjecture. Barrett's admission that he had no idea of how the Company made its bonus decisions totally divorces his opinion of the reasons underlying the withholding of the 1957 bonus from the actual reasons upon which the Company acted. Consequently, no inference of motive can be drawn from what Barrett said.

Lastly, the Board relied upon a statement made by Fegtly: "The lengthy strike at Santa Clara in 1957 obviously affected the earnings of the Santa Clara plant for that year. It was determined that the hourly employees at the other plants should not be penalized." From this the Board inferred once again that the Santa Clara production and maintenance employees were being punished

for striking. The inference here is not quite so far-fetched as the inferences drawn by the Board from the evidence previously discussed. However, a statement *in vacuo* is one thing; looked at in context, it is another. Fegtly's testimony was to a large extent an elucidation of the Company's present position, that the denial of the bonus to the Santa Clara strikers in 1957 was due to the application of the Five Factor Formula, especially factor 4, which measured group productivity. The strike of necessity lowered this productivity at Santa Clara while the productivity at the other plants remained high since no other prolonged strike occurred during the year. The Board, however, seized upon Fegtly's use of the word "penalized" to ascribe to his statement a meaning which is refuted by page after page of his testimony at the hearing. On the record as a whole, the inference drawn by the Board is unjustified.

In sum, on the basis of a number of unwarranted inferences the Board overturned the credibility findings of the Trial Examiner and concluded that petitioner's motive in denying a bonus to the production and maintenance workers at Santa Clara was to penalize them for engaging in a prolonged strike. The record in its entirety is too weak to sustain such a position. We hold that the evidence to support the decision of the Board that the Company was motivated by a desire to punish strikers and thus to interfere with and discourage protected activity is fatally insubstantial, that the record before us "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490, 27 LRRM 2373 (1951). In the absence of sufficient evidence to show that the true intent of the employer was to interfere with or discourage protected activity, the

Board's order cannot stand. See N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46, 1 LRRM 703 (1937); Associated Press v. N.L.R.B., 301 U.S. 103, 132, 1 LRRM 732 (1937); Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 42-44, 33 LRRM 2417 (1954).

This is not an easy case. We are fully aware that the vacillations of group productivity are predictably so closely related to participation by the group in protected activity that an extension of the Radio Officers' rule may well be thought appropriate from a policy viewpoint. Indeed, the fifth factor in the Company's formula is so broad and flexible that it fairly cries out for abuse, abuse which could conceivably insure that only the low group productivity caused by engagement in prolonged strikes would result in the denial of bonuses. Nonetheless, we do not think the record in the instant case justifies such a step. The evidence showed that petitioner had initiated the administration account procedure in 1936, only one year after the passing of the Wagner Act and before the first Labor Act cases were decided by the Supreme Court. This fact, in our view, minimizes the possibility that the formula was devised as a coverup for unlawful discrimination. Moreover, the evidence before the Board clearly failed to establish that the formula was in fact so utilized or that the formula was not used at all. An employer is not guilty of unfair labor practices simply because his activity can all too easily be perverted into a system of unlawful discrimination. The unlawful act itself, not proximity to it, must be shown.

The petition to set aside the order of the Board here reviewed is granted. The order is set aside.

SUPREME COURT OF THE UNITED STATES

Nos. 64 and 85.—October Term, 1960.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner, 64 v. National Labor Relations Board.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
National Labor Relations Board, Petitioner, 85 v. Local 357, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America.	

[April 17, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner union (along with the International Brotherhood of Teamsters and a number of other affiliated local unions) executed a three-year collective bargaining agreement with California Trucking Associations which represented a group of motor truck operators in California. The provisions of the contract relating to hiring of casual or temporary employees were as follows:

> "Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any

employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, *irrespective of whether such employee is or is not a member of the Union.*

"Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source." (Emphasis added.)

Accordingly the union maintained a hiring hall for casual employees. One Slater was a member of the union and had customarily used the hiring hall. But in August 1955 he obtained casual employment with an employer who was party to the hiring-hall agreement without being dispatched by the union. He worked until sometime in November of that year, when he was discharged by the employer on complaint of the union that he had not been referred through the hiring-hall arrangement.

Slater made charges against the union and the employer. Though, as plain from the terms of the contract, there was an express provision that employees would not be discriminated against because they were or were not union members, the Board found that the hiring-hall provision was unlawful *per se* and that the discharge of Slater on the union's request constituted a violation by the em-

ployer of § 8 (a) (1) and § 8 (a) (3) and a violation by the union of § 8 (b) (2) and § 8 (b) (1) (A) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 140–141, as amended, 29 U. S. C. § 158.[1] The Board ordered, *inter alia*, that the company and the union cease giving any effect to the hiring-hall agreement; that they jointly and severally reimburse Slater for any loss sustained by him as a result of his discharge; and that they jointly and severally reimburse all casual employees for fees and dues paid by them to the union beginning six

[1] Section 8 provides in relevant part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . ."

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

months prior to the date of the filing of the charge. 121 N. L. R. B. 1629.

The union petitioned the Court of Appeals for review of the Board's action, and the Board made a cross-application for enforcement. That court set aside the portion of the order requiring a general reimbursement of dues and fees. By a divided vote it upheld the Board in ruling that the hiring-hall agreement was illegal *per se*. 275 F. 2d 646. Those rulings are here on certiorari, 363 U. S. 837, one on the petition of the union, the other on petition of the Board.

Our decision in *Carpenters Local 60 v. Labor Board*, decided this day, *ante*, p. —, is dispositive of the petition of the Board that asks us to direct enforcement of the order of reimbursement. The judgment of the Court of Appeals on that phase of the matter is affirmed.

The other aspect of the case goes back to the Board's ruling in *Mountain Pacific Chapter*, 119 N. L. R. B. 883. That decision, rendered in 1958, departed from earlier rulings,[1] and held, Abe Murdock dissenting, that the hiring-hall agreement, despite the inclusion of a nondiscrimination clause, was illegal *per se*:

> "Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status. Here all that appears is unilateral union determination and subservient employer action with no aboveboard explanation as to the reason for it, and it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty in some other respect. The Employers here have surrendered all hiring authority to the Union

[1] See *Hunkin-Conkey Constr. Co.*, 95 N. L. R. B. 433, 435.

and have given advance notice, via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. From the final authority over hiring vested in the Respondent Union by the three AGC chapters, the inference of the encoursement of union membership is inescapable." *Id.*, 896.

The Board went on to say that a hiring-hall arrangement to be lawful must contain protective provisions. Its views were stated as follows:

"We believe, however, that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be non-discriminatory on its face, only if the agreement explicitly provided that:

"(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

"(2) The employer retains the right to reject any job applicant referred by the union.

"(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement." *Id.*, 897.

The Board recognizes that the hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." *Id.*,

896, n. 8. The hiring hall at times has been a useful adjunct to the closed shop.[3] But Congress may have thought that it need not serve that cause, that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry.[4] In the latter the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs;[5] and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment."[6]

Congress has not outlawed the hiring hall, though it has outlawed the closed shop except within the limits prescribed in the *provisos* to § 8 (a)(3).[7] Senator Taft made

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[3] Fenton, Union Hiring Halls Under the Taft-Hartley Act, 9 Lab. L. Jour. 505, 506 (1958).

[4] Cf. *id.*, at 507. For expression of such view see S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 4–8; Goldberg, The Maritime Story (1958), pp. 277–282.

[5] Fenton, *op. cit., supra*, note 3, at 507.

[6] *Id.*, at 507.

[7] Those *provisos* read:

"*Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in § 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and has at the time the agreement was made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not

clear his views that hiring halls are useful, that they are not illegal *per se*, that unions should be able to operate them so long as they are not used to create a closed shop:

> "In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall. He should not be able to bind himself, however, to reject nonunion men if they apply to him; nor should he be able to contract to accept men on a rotary-hiring basis. . . .
>
> "The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. The Board and the court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 13, 14.

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available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that encourages or discourages union membership.[1] As respects § 8 (a)(3) we said in *Radio Officers* v. *Labor Board*, 347 U. S. 17, 42–43:

> "The language of § 8 (a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

It is the "true purpose" or "real motive" in hiring or firing that constitutes the test. *Id.*, 43. Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. *Id.*, 45. And see *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793. The existence of discrimination may at times be inferred by the Board, for "it is permissible to draw on experience in factual inquiries." *Radio Officers* v. *Labor Board*, *supra*, 49.

But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against "casual employees" because of the presence or absence of union membership. The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring-hall agreement. When an employer and the union

[1] See §§ 7 and 8, *supra*, note 1.

enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed.

It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But as we said in *Radio Officers* v. *Labor Board*, *supra*, the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination." P. 43.

Nothing is inferrable from the present hiring-hall provision except that employer and union alike sought to route "casual employees" through the union hiring hall and required a union member who circumvented it to adhere to it.

It may be that hiring halls need more regulation than the Act presently affords. As we have seen, the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 284–290. Where, as here, Con-

gress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

The present agreement for a union hiring hall has a protective clause in it, as we have said; and there is no evidence that it was in fact used unlawfully. We cannot assume that a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language. Yet we would have to make those assumptions to agree with the Board that it is reasonable to infer the union will act discriminatorily.

Moreover, the hiring hall, under the law as it stands, is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements. Cf. *Labor Board* v. *American Inc. Co.*, 343 U. S. 395, 404. Its power, so far as here relevant, is restricted to the elimination of discrimination. Since the present agreement contains such a prohibition, the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 64 AND 85.—OCTOBER TERM, 1960.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner,	
64 v.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
National Labor Relations Board.	
National Labor Relations Board, Petitioner,	
85 v.	
Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.	

[April 17, 1961.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

I join the Court's opinion upon considerations which, though doubtless implicit in what my Brother DOUGLAS has written, in my view deserve explicit articulation.

The Board's condemnation of these union "hiring hall" procedures as violative of §§ 8 (a) 1, 8 (a) 3, 8 (b) 1, and 8 (b) 2 of the Taft-Hartley Act[1] ultimately rests on a now well-established line of circuit court cases to the effect that a clause in a collective bargaining agreement may, without more, constitute forbidden discrimination. See, *e. g.*, *Red Star Express Lines* v. *Labor Board*, 196 F. 2d 78. While seeming to recognize the validity of the proposition that contract terms which are equivocal on

[1] Set forth in note 1 of the Court's opinion, *ante*, p. —.

their face should ordinarily await an independent evaluation of their actual meaning and effect[2] before being deemed to give rise to an unfair labor practice, such cases have justified short-circuiting that course upon these considerations: The mere existence of a clause that on its face appears to declare preferential rights for union members encourages union membership among employees or job applicants, persons not privy to the undisclosed intent of the parties, yet affected by the apparent meaning of the contract. Hence the mere possibility that such a clause may actually turn out not to have been administered by the parties so as to favor union members is not enough to save it from condemnation as an unlawful discrimination.

I think this rationale may have validity under certain circumstances, but that it does not carry the day for the Board in these cases. The Board recognizes, as it must, that something more than simply actual encouragement or discouragement of union members must be shown to make out an unfair labor practice, whether the action involved be that of agreeing to a contract term or discharging an employee or anything else. In this regard, it contends that the action of agreeing to the union "hiring" clause should be treated like any other employer or union action and that, on this premise, all that the Board must show in the light of *Radio Officers' Union* v. *Labor Board*, 347 U. S. 17, is that the tendency to encourage or discourage union membership was *foreseeable* to the employer or union. Since one is presumed to intend the foreseeable consequences of his acts, and since acting in order to encourage or discourage union membership is forbidden, the Board's case is said to be made by a simple showing

[2] As determined, for example, from the parties' actions under them, through grievance procedures, or by arbitration, if so provided in the collective bargaining agreement.

that such encouragement or discouragement is the foreseeable result of employer or union action. The Board then concludes with a showing that encouragement of union membership is a foreseeable consequence of the acts of agreeing to or operating a union-run hiring hall.

Though, as will appear (*infra*, p. ——), I believe the Board erroneously construed this Court's decision in *Radio Officers*, I do not think we can reverse its finding of "encouragement." While I agree with the opinion of the Court that the Board could not infer from the mere existence of the "hiring hall" clause an intent on the part of employer or union to discriminate in favor of union status, I think it was within the realm of Board expertness to say that the natural and foreseeable effect of this clause is to make employees and job applicants think that union status will be favored. For it is surely scarcely less than a fact of life that a certain number of job applicants will believe that joining the union would increase their chances of hire when the union is exercising the hiring function.

What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. See *Labor Board* v. *Universal Camera Corp.*, 190 F. 2d 429. Yet a court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity. Again, an employer can properly make the existence or amount of

a year-end bonus depend upon the productivity of a unit of the plant, although this will foreseeably tend to discourage the protected activity of striking. *Pittsburgh-Des Moines Steel Co.* v. *Labor Board*, 284 F. 2d 74. A union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to encourage union membership.

This Court's interpretation of the relevant statutory provisions has recognized that Congress did not mean to limit the range of either employer or union decision to those possible actions which had *no* foreseeable tendency to encourage or discourage union membership or concerted activities. In general, this Court has assumed that a finding of a violation of §§ 8 (a) 3 or 8 (b) 2 requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity. See, *e. g.*, *Labor Board* v. *Jones & Laughlin Co.*, 301 U. S. 1, 45–46; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474. There have, to be sure, been exceptions to this requirement, but they have been narrow ones, usually analogous to the exceptions made to the requirements for a showing of discrimination in other contexts. For example, in *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, the Court affirmed a Board decision that a company "no solicitation" rule was over-broadly applied to prevent solicitation of union membership on company property during periods when employees were otherwise free to do as they pleased. A finding of a motivation to discourage union membership was there held unnecessary because there was no employer showing of a nondiscriminatory purpose for applying the rule to union solicitation during the employees' free time. A similar absence of a significant business justification for the employer's acts which tended to discourage union activity explains the dis-

pensability of proof of discriminatory motivation in *Allis-Chalmers Mfg. Co. v. Labor Board*, 162 F. 2d 433, *Cusano v. Labor Board*, 190 F. 2d 898, and *Labor Board v. Industrial Cotton Mills*, 208 F. 2d 87.

Another field of exceptions to the requirement of a showing of a purpose to encourage or discourage union activity is found in the Court's affirmance of the Second Circuit in *Gaynor News Co., Inc., v. Labor Board*, 347 U. S. 17, a companion case to *Radio Officers*: If a union or employer is to be permitted to take action which substantially—though unintentionally—encourages or discourages union activity, the union or employer ends served by the action must not only be of some significance, but they must also be legitimate, or at least not otherwise forbidden by the National Labor Relations Act. In *Gaynor* an employer who, pursuant to a nondiscriminatory business end of paying the least wages possible, agreed with the union which was statutory representative of the employees to give certain benefits only to union members, was prevented from asserting the justifying business reasons for thus encouraging union membership because of his complicity in the union's breach of its duties as agent for *all* the employees. Indeed, the fact that a nondiscriminatory business purpose forbidden by the Act cannot be used by an employer to justify an action which incidentally encourages union membership, seems to me to be the true basis of the Court's holding in *Radio Officers* that an employer violates § 8 (a) 3 when a union forces him to take actions in order to encourage union membership. The employer's nondiscriminatory reason for encouraging union membership—to avoid the economic pressure the union could impose upon him—was surely no longer intended to be a justification for such employer action after the passage of § 8 (b) 2, a statutory provision the very wording of which presupposed that union coercion can cause a violation of § 8 (a) 3.

There is no reason to decide now whether there are other contexts in which a showing of an actual motivation of encouraging or discouraging union activity might be unnecessary to a finding of a union or employer unfair labor practice. For present purposes, it is sufficient to note that what is involved in the general requirement of finding of forbidden motivation, as well as in the limited scope of the heretofore recognized exceptions to this general requirement, is a realization that the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees. It is against this policy that we should measure the Board's action in finding forbidden the incorporation in collective bargaining contracts of the "hiring hall" clause. We must determine whether the Board's action is consistent with the balance struck by the Wagner and Taft-Hartley Acts between protection of employee freedom with respect to union activity and the privilege of employer and union to make such nondiscriminatory decisions as seem to them to satisfy best the needs of the business and the employees.

The legislative background to § 8 (a) 3 of the Act is quite clear in its indications of where this balance was to be struck. The Senate Report on this section of the original Wagner Act states:

> "The fourth unfair labor practice [then § 8 (3)] is a corollary of the first unfair labor practice. An employer, of course, need not hire an incompetent man and is free to discharge an employee who lacks skill or ability. But if the right to join or not to join a labor organization is to have any real meaning for an employee, the employer ought not to be free to discharge an employee *merely* because he joins

an organization or to refuse to hire him *merely* because of his membership in an organization. Nor should an employer be free to pay a man a higher or lower wage *solely* because of his membership or nonmembership in a labor organization. The language of the bill creates safeguards against these possible dangers." S. Rep. No. 1184 on S. 2926, 73d Cong., 2d Sess. 6. (Emphasis added.)

And similarly:

"Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercize will not result in discriminatory treatment or loss of the opportunity for work." S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 11.

To the same effect was the view of Senator Walsh:

". . . The employer has the economic power; he can discharge any employee or any group of employees when their *only* offense may be to seek to form a legitimate organization among the workers for the purpose of collective bargaining. This bill declares that is wrong. It declares that the employee has the right to engage in collective bargaining, and it says, 'Mr. Employer, you must keep your hands off; you shall not use that effective power of dismissal from employment which you have and destroy the organization of the employees by the dismissal of one or more of your employees *when they are objectionable on no other ground than that*

they belong to or have organized a labor union." Statement of Senator Walsh, 79 Cong. Rec. 7658. (Emphasis added.)

And further, the House Report on the bill stated:

> "Nothing in this subsection prohibits interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination." H. R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. 19.

Considered in this light, I do not think we can sustain the Board's holding that the "hiring hall" clause is forbidden by the Taft-Hartley Act. The Board has not found that this clause was without substantial justification in terms of legitimate employer or union purposes. Cf. *Republic Aviation* v. *Labor Board*, *supra*; *Gaynor News Co., Inc.*, v. *Labor Board*, *supra*. Whether or not such a finding would have been supported by the record is not for us now to decide. The Board has not, in my view, made the type of showing of an actual motive of encouraging union membership that is required by *Universal Camera* v. *Labor Board*, *supra*. All it has shown is that the clause will tend to encourage union membership, and that without substantial difficulty the parties to the agreement could have taken additional steps to isolate the valid employer or union purposes from the discriminatory effects of the clause.[1] I do not think

[1] In connection with such clauses, the Board would have "the parties to the agreement post in places where notices to employees

that these two elements alone can justify a Board holding of an unfair labor practice unless we are to approve a broad expansion of the power of the Board to supervise nondiscriminatory decisions made by employer or union. Whether or not such an expansion would be desirable, it does not seem to me consistent with the balance the labor acts have struck between freedom of choice of management and union ends by the parties to a collective bargaining agreement and the freedom of employees from restraint or coercion in their exercise of rights granted by § 7 of the Act.[1]

I therefore agree with the Court that the Board's holding that the clause in question is invalid cannot be sustained.

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and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement." These safeguards, which are also to be made contract terms, provide that:

"(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect of obligation of union membership, policies, or requirements.

"(2) The Employer retains the right to reject any job applicant referred by the union."

[1] Set forth in note 1 of the Court's opinion, *ante*, p. —.

SUPREME COURT OF THE UNITED STATES

Nos. 64 AND 85.—OCTOBER TERM, 1960.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner,	
64 v.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
National Labor Relations Board.	
National Labor Relations Board, Petitioner,	
85 v.	
Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.	

[April 17, 1961.]

MR. JUSTICE CLARK, dissenting in part.[1]

I cannot agree with the casual treatment the Court gives to the "casual employee" who is either unable to get employment or is fired therefrom because he has not been cleared by a union hiring hall. Inasmuch as the record, and the image of a hiring hall which it presents, is neglected by the Court, a short resume of the facts is appropriate.

Lester Slater, the complainant, became a "casual employee" in the truck freight business in 1953 or early 1954. He approached an employer but was referred to the union hiring hall. There the dispatcher told him to

[1] I agree with the Court's disposition of that part of the Board's petition seeking direct enforcement of the order of reimbursement.

see Barney Volkoff, an official of the union, whose office in the union headquarters building was some three miles away. Describing his visit to Volkoff, Slater stated that "[I] just give him [Volkoff] the money to send back East to pay up my dues back there for the withdrawal card, . . . and I went right to the [hiring] hall and went to work." However, this was but the beginning of Slater's trouble with the hall. After some difficulty with one of his temporary employers (Pacific Intermountain Express), the hall refused to refer Slater to other employers. In order to keep employed despite the union hall's failure to dispatch him, Slater relied on a letter from John Annand, an International Representative of the union, stating that "you may seek work wherever you can find it in the freight industry without working through the hiring hall." It was this letter that obtained Slater his employment with Los Angeles-Seattle Motor Express, where he was characterized by its dock foreman as being "a good worker." After a few months employment, the Business Agent of the union (Victor Karaty) called on the Los Angeles-Seattle Motor Express, advising that it could not hire Slater "any longer here without a referral card"; that the company would "have to get rid of Slater, and if [it] . . . didn't, that he was going to tie the place up in a knot, [that he] would pull the men off." Los Angeles-Seattle Motor Express fired Slater, telling him that "[We] . . . can't use you now until you get this straightened out with the union. Then come back; we will put you to work." He then went to the union, and was again referred to Volkoff who advised, "I can't do anything for you because you are out. You are not qualified for this job." Upon being shown the Annand letter, Volkoff declared "I am the union." On later occasions when Slater attempted to get clearance from Volkoff he was asked "How come you weren't out on that—didn't go out on the picket line?" (Apparently

the union had been on a strike.) Slater replied, "I told him that nobody asked me to. I was out a week. I thought the strike was on. The hall was closed. The guys told me there weren't no work." The landlady of Slater also approached Volkoff in an effort to get him cleared and she testified that "I asked Mr. Barney Volkoff what he had against Lester Slater and why he was doing this to him." And she quoted him as saying: "For a few reasons, one is about the P. I. E. [Pacific Intermountain Express] . . . [a]nother thing, he is an illiterate." She further testified that "he [Volkoff] didn't like the way he dressed. And he [Volkoff] fussed and fussed around." He therefore refused to "route," as the Court calls it, Slater through the union hiring hall.

The Court finds that the National Labor Relations Act does not ban hiring halls *per se* and that therefore they are illegal only if they discriminate on the basis of union membership. It holds that no such actual discrimination was shown and that none is inferable from the face of the contract since it has a protective clause. Collaterally it holds, quoting Senator Taft that hiring halls are "useful"; that they save time and eliminate waste and, finally, that the Court "cannot assume that a union conducts its operations in violation of law."[2]

I do not doubt for a moment that men hired through such arrangements are saved the expense and delay of making the rounds of prospective employers on their own. Nor do I doubt their utility to employers with varying employee demands. And I accept the fact that Congress has outlawed only closed shops and allowed hiring halls

[2] Interestingly enough, the Board in its Twenty-Third Annual Report (1958), characterized its holding in *Mountain Pacific Chapter*, 119 N. L. R. B. 883, in the following language: "It may reasonably be inferred, the Board held, that a union to which an employer has so delegated hiring powers will exercise its power with a view to securing compliance with membership obligations and union rules." At p. 68.

to remain in operation. But just as those observations are not, in the final analysis, relied upon by the Court today in reaching its decision, my acquiescence in them is only a prologue to my dissent from the remaining considerations upon which its decision actually rests. These considerations are dependent upon the construction given § 8 (a)(3) and I therefore first turn to that section.

Section 8 (a)(3) provides, in part, that it shall be an unfair labor practice for an employer

> "*by discrimination* in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage* membership in any labor organization. . . ." (Emphasis added.)

As I view this prohibition, which by § 8 (b)(2) is also applied to unions when causing or attempting to cause any employer to violate this section, two factors must be present before there is an unfair labor practice: (1) discrimination in the hiring or tenure of employees which is intended to, or inherently tends to, result in (2) encouragement or discouragement of membership in a union.

The word "discrimination" in the section, as the Board points out and I agree, includes not only distinctions contingent upon "the presence or absence of union membership," *ante*, p. ——, but all differences in treatment regardless of their basis. This is the "cause" portion of the section. But § 8 (a)(3) also includes an "effect" clause which provides that the intended or inherent effect of the discrimination must be "to encourage or discourage [union] membership." The section has, therefore, a divided structure. Not all discriminations violate the section, but only those the effect of which is encouragement or discouragement of union membership. Cf. *Radio Officers* v. *Labor Board*, 347 U. S. 17, at 43: "Nor does this section outlaw discrimination in employment as such;

only such discrimination as encourages or discourages membership in a labor organization is proscribed." Each being a requirement of the section, both must be present before an unfair labor practice exists. On the other hand, the union here contends, and the Court agrees, that there can be no "discrimination" within the section *unless it is based on* union membership, *i.e.*, members treated one way, nonmembers another, with further distinctions among members, based on good standing. Through this too superficial interpretation, the Court abuses the language of the Congress and unduly restricts the scope of the proscription so that it forbids only the most obvious "hard-sell" techniques of influencing employee exercise of § 7 rights.

Even if we could draw no support from prior cases, the plain and accepted meaning of the word "discrimination" supports my interpretation. In common parlance, the word means to distinguish or differentiate. Without good reason, we should not limit the word to mean to distinguish in a particular manner (*i. e.*, on the basis of union membership or activity) so that a finding that the hall dispatched employees without regard to union membership or activity bars a finding of violation. The mere fact that the section *might* be read in the manner suggested by the union does not license such a distortion of the clear intent of the Congress, *i. e.*, to prohibit all auxiliaries to the closed shop, and all pressures on employee free choice, however subtly they are established or applied. Moreover, our interpretation in *Radio Officers* v. *Labor Board*, *supra*, supports this position. There we said:

> "*The unfair labor practice is for an employer* [*1*] *to encourage or discourage membership* [*2*] *by means of discrimination.* Thus this section does not outlaw all encouragement or discouragement of membership

> in labor organizations; only such as is accomplished by discrimination is prohibited. *Nor does this section outlaw discrimination in employment as such; only [1] such discrimination [2] as encourages or discourages* membership in a labor organization is proscribed." At pp. 42–43. (Emphasis added.)

The Court's conclusion is in patent conflict with that reasoning.

Given that interpretation of the word "discrimination," it becomes necessary to determine the class of employee involved, and then whether *any* differences in treatment within that class are present. The Board found the class affected by the union hiring hall to be that group which was qualified, in the sense of ability, to do the work required by the employer and who had applied for work through the hiring hall. Obviously, not all of those who apply receive like treatment. Not all applicants receive referral cards. Clearly, then, the class applying to the hiring hall is itself divided into two groups treated differently—those cleared by the union and those who were not. The next question is whether the contract requiring and endorsing that discrimination or differentiation is designed to, or inherently tends to, encourage union membership. If it does, then § 8 (a)(3) has been violated.

I begin with the premise that the Congress has outlawed the closed shop and that, as the Court pointed out, "[t]he policy of the Act is to insulate employees' jobs from their organizational rights." *Radio Officers, supra*, at 40. To test the contract here, I look to probable and anticipated "employee response" to it, *id.*, at 46, recognizing that "[e]ncouragement and discouragement are 'subtle things' requiring 'a high degree of introspective perception.'" *Id.*, at p. 51. Just as in cases of his interference with protected activities, the escape value of the

employer's "true purpose" and "real motive" is to be tested by the "natural consequences" and "foreseeable result" of his resort, however justifiably taken, to an institution so closely allied to the closed shop. I believe, as this Court has recognized, that " the desire of employees to unionize is directly proportional to the advantages *thought to be* obtained . . . ." *Radio Officers, supra*, at 46. (Emphasis added.) I therefore ask, "Does the ordinary applicant for casual employment, who walks into the union hall at the direction of his prospective employer, consider his chances of getting dispatched for work diminished because of his non-union status or his default in dues payment?" Lester Slater testified—and it is uncontradicted—that "He [the applicant] had to be a union member; otherwise he wouldn't be working there; . . . you got to have your dues paid up to date and so forth." When asked how he knew this, Slater replied, "I have always knew that." Such was the sum of his impressions gained from contact with the hall from 1953 or 1954 when he started to 1958 when he ended. The misunderstanding—if it is that—of this common worker, who had the courage to complain, is, I am sure, representative of many more who were afraid to protest or, worse, were unaware of their right to do so.

Of the gravity of such a situation the Board is the best arbiter and best equipped to find a solution. It is, after all, "permissible [for the Board] to draw on experience in factual inquiries." *Radio Officers, supra*, at 49. It has resolved the issue clearly, not only here, but in its 1958 Report which, as I have said, repeated its *Mountain Pacific* position "that a union to which an employer has so delegated hiring powers will exercise its powers with a view to securing compliance with membership obligations and union rules." At p. 68. In view of

Slater's experience, for one, the idea is certainly not far-fetched. Despite the contract provision as to equal treatment between union and nonunion men after a minimum amount of seniority is obtained, we find here that Slater had to "pay up" his dues in 1953. Despite the seniority rule,[1] dispatch was often made, the record shows, due to favoritism by the employer. Despite the contract's solemn words, the uncontradicted evidence is that lack of intellect, taste in dress and failure to appear on a union picket line prevented an employee from getting a job, although he was a "good worker." Likewise, approaching a union official (who indignantly asserts "I am the union") with a letter from a union "higher-up" may result in loss of work. Such factors are infinitely more persuasive than the self-serving declaration of a union hiring-hall agreement.

However, I need not go so far as to presume that the union has set itself upon an illegal course, conditioning referral on the unlawful criterion of union membership in good standing (which inference the majority today says cannot be drawn), to reach the same result. I need only assume that, by thousands of common workers like Slater, the contract and its conditioning of casual employment upon union referral will work a misunderstanding as to the significance of union affiliation unless the employer's abdication of his role be made less than total and some note of the true function of the hiring hall be posted where all may see and read. The tide of encouragement may not be turned, but it will in part at least be stemmed. As an added dividend, the inherent probability of the free-wheeling operation of the union hiring

[1] The employers did not receive any seniority lists from the union and were unaware of whether this provision of the agreement was being properly administered.

hall resulting in arbitrary dispatching of job seekers would to some significant extent be diminished.

I would hold that there is not only a reasonable likelihood, but that it must inescapably be concluded under this record, that, without the safeguards at issue, a contract, conditioning employment *solely upon union referral*, encourages membership in the union by that very distinction itself. As the Board expressed it in *Mountain Pacific Chapter*, *supra*, at 895:

> "[T]he very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status."

A reasonable interpretation of the Act also demands that both the employer and the union be deemed violators. In determining that issue, I say that the Board is the best judge. I say that it has made an "allowable judgment." It is not for the courts to differently assess the hiring hall's "cumulative effect on employees" or job applicants. *Labor Board* v. *Sture Spinning Co.*, 336 U. S. 226, 231. Its findings here should, therefore, "carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488.

Finally, let me say that the Board should not be hamstrung in its effort to enforce the mandate of the Congress that there shall be no closed shop. As Senator Taft stated on the floor of the Senate:[1]

> "Perhaps [the closed shop] is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them . . . . Such an arrangement gives the

[1] 93 Cong. Rec. 3836, II Leg. Hist. 1010.

union tremendous power over the employees; furthermore, it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field."

That is where Lester Slater finds himself today. I therefore dissent.

MR. JUSTICE WHITTAKER joins in all except note 1 of this dissent, but would also add the reasons, respecting the Board's powers to make the order in question, that are stated in his dissent in No. 68, *Carpenters, Local 60* v. *Labor Board*, decided this day, *post*, p. —.